No. 6168

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. E. WENIGER and CHARLES BLOOM,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

On Appeal from the District Court of the United States for the District of Idaho. Northern Division.

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United States Attorney,
SAM S. GRIFFIN,
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Counsel for Appellee.

Filed....., 1930.

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STATEMENT

Since the statement of appellants is largely argument, and fails to outline the story of the case as developed by the evidence, appellee is required to make the following detailed statement that the court may have in mind the facts.

An indictment was returned by the grand jury charging appellant Weniger, who was sheriff of Shoshone County, Idaho, at the time of trial, and since January 1923 (Tr. 680), appellant Bloom, who was deputy sheriff of said county at the time of

trial and since Jan. 1923 (Tr. 726) and Joseph Florin, Harcourt Morphy and F. O. Welch, former chiefs of police of the village of Mullan, Shoshone County, Idaho, Elmer Olson, Arthur J. Harwood, John Wheatley, Clarence McMurray, Charles Ristau, Henry Foss, and George Huston, present or former members of the Board of Trustees of said Village, and 32 others, with conspiracy to violate the National Prohibition Act relating to the possession, transportation, sale and manufacture of intoxicating liquor, and the maintenance of liquor nuisances in the Village of Mullan, Shoshone County, Idaho. The conspiracy was charged to have orginated on or about Feb. 1, 1924, and continued thereafter to the return of the indictment. Thirty overt acts were set out in the indictment, to the effect that defendant members of the Village Board voted for Ordinance No. 105, and appointed defendants Welch and Florin police officers, appellant Bloom received money, gave warning of impending raids by Federal Prohibition officers, and drank whiskey in the Mullen Inn; that the various defendants at different times possessed and sold whiskey or beer, and that defendants Welch and Florin at various times delivered to one Martin lists showing payments by persons dealing in intoxicating liquors (Tr. 17-26). Plea in abatement was filed by appellant (Tr. 27-30) answered by the government (Tr. 31) and, after a hearing, denied by the Court

(Tr. 32). Though assigned as error (Tr. 66), this denial is not argued in appellant's brief, is apparently abandoned, and a statement of facts relating thereto is unnecessary.

After entry of pleas of not guilty twenty-nine defendants went to trial on Dec. 16, 1929, and verdict of guilty against the appellants Weniger, sheriff, and Bloom, deputy sheriff, and against the Village Trustees, and police officers who were on trial, and a number of others (twenty-four in all) was returned on December 29, 1929. Judgments were pronounced, from which Weniger and Bloom alone appeal. (Tr. 33-65).

It is not clear from appellant's brief whether appellants deny the existence of any conspiracy as charged, or only deny appellant's connection with an admitted conspiracy. However, the evidence shows:

The Village of Mullan, Shoshone County, Idaho is a Mining Community of about 3000 people, with a small business district of one or two streets, one block long. It is seven miles from Wallace, the County seat, where the Sheriff's office is located, and 69 miles from Coeur d'Alene, Idaho, the station of the two Federal Prohibition Agents whose jurisdiction extends over the five northern counties of Idaho, including Shoshone County. From Coeur d'Alene to Mullan, these Agents would have to pass through Wallace, (Tr. pp. 188, 196, 240-241, 433, 456-457, 460, 478, 590, 697, 702).

Two of the defendants, Harwood and Olson were, at the time of the origin of the conspiracy, Village trustees, together with three others now dead (Tr. 324, 418, 600), and continued as trustees throughout; defendant Wheatley became a trustee in 1925, and defendants Foss, Huston, and Ristau became trustees in 1927, all continuing thereafter as such during the conspiracy, (Tr. 334-338). Defendant Florin was Chief of Police in 1925, 1926, Needham was Chief in 1927, 1928, and Welch, who had been night policeman under Florin and Needham, became Chief in the fall of 1928 and continued until trial. Defendant Morphy was night policeman under Welch, (Tr. 189, 339-341).

Appellants Weniger and Bloom became Sheriff, and Deputy Sheriff, respectively, of Shoshone County, in January, 1923 and continued as such up to the time of the trial. Bloom was known as the Mullan deputy, having lived at that place. He had, prior to State prohibition, been a saloon keeper there, and in Wallace, and served during the six years prior to becoming deputy sheriff, as a policeman in Mullan, being appointed shortly after his conviction for violation of the liquor law, (Tr. 236, 680, 696, 717, 726). There were six deputy sheriffs, all, except one, stationed within a few miles of Mullan, (Tr. 696-697) and Appellant Bloom kept his residence and family at Mullan. Such was the set-up of officials, made defendants in this case, during

the period of the conspiracy, Feb. 1924 to Nov. 1929.

Prior to the conspiracy there was in force in Mullan an ordinance licensing pool halls, soft drink parlors, card playing places and restaurants. The license was nominal—$16.00 per year, and the proprietor to post bond in the penal sum of $500.00 conditioned, among other things, that the liquor law would not be violated. (Tr. 319-322; Ordinance No. 103).

Shortly before Feb. 4, 1924 consideration began among the people and Village officers of raising additional money and a general occupation license tax scheme was formulated. Being advised by their attorney that only a regulatory, and not a revenue, license could be charged, rather nominal amounts were fixed for legitimate business—for example, garages, $16.00 per year, livery stables, $6.00 per year, hotels, restaurants and laundries, $3.00 per quarter, barber shops and general stores, $1.50 per quarter. But places where soft drinks (this is the term used in the ordinance) were sold, either alone or connected with other business, were to be charged $25.00 per month, or $300.00 per year in contrast with the charge under ordinance No. 103 of $16.00 per year, and no bond was required. Made suspicious by this large amount, the Village attorney warned that no attempt must be made thereby to license the sale of liquor, (Tr. 307-317; 416-419, 604). However, a committee of liquor dealers waited

on the trustees and agreed to pay this amount, (Tr. 254, 255) and agreed among themselves for a standard price for liquor—25c for drinks of whiskey and glasses of beer, and for whiskey, $2.00 per pint. (Tr. 270). That this agreement was lived up to is shown by the buys of liquor made from time to time during the period of the conspiracy. On Feb. 4, 1924, Ordinance 105 embodying the foregoing was passed by the Trustees, (Tr. 324-325) with the "soft drink" license provision designed to license liquor joints (Tr. 193, 236, 327, 544, 547, 609), and repealing Ordinance No. 103.

Harwood operated drug stores in which were soda fountains. He had previously paid the $16.00 soft drink license, but did not, nor did other legitimate soft drink places, pay the $25.00 a month license. (Tr. 235, 605-607)

After the passage of this ordinance the Village Clerk made out the licenses, gave them to the then Chief of Police, who collected, and returned, the money to the Clerk, who credited it to the general fund. This method continued until July 1929, and numerous places in the small business district operated for the sale of liquor unmolested, though frequented, by the local police and Appellants Bloom and Weniger, deputy sheriff and sheriff. Mullan was generally known as a wide open town. (Tr. 277, 281, 297-299, 303, 346-347, 397-398, 404, 581, 583, 587, 588).

The license system, however, did not reach all the

handlers of liquor, but only those operating in the business district; nor did it reach prostitution or gambling. Hence, in May, 1925, a system of "volunteer" subscriptions to the village by prostitutes and gamblers, and liquor dealers outside the business district was inaugurated and continued until July, 1929. Each month the Village Clerk made up a paper headed with a recitation of the local tax situation, the need for money for streets, bridges and sewers, and pledging the signers to pay amounts for such purposes. (Exs. 2, 7; Tr. 199-232; 348-390, 397). The then Chief of Police would visit gambling and prostitution houses and beer peddlers, or those thought to be such, and collect from them, turning the money to the Clerk who credited it to the general fund, and reported the collections, and names of subscribers to the Trustees. (Tr. 193, 397)

Needham, once Chief of Police, and Martin, Village Clerk, who testified for the Government, described the system, as it had already become fully established by the time of Needham's appointment. Upon his appointment, he and defendant Welch, then night policeman, later Chief, visited the bootlegging joints; Needham was introduced to the proprietors. They visited the Marble Club, Marble Front Apartments, Coffee House, Bilberg Hotel Bar, Miners Club, Mullan Pool Hall, Mullan Inn, Fern Apartments. (Tr. 189, 239). A day or two later Harwood gave Needham a list of names from whom

to collect; some places he was directed to ascertain whether liquor was sold. (Tr. 190; Ex. 1). He visited the places listed, some of which were gambling joints, collected what the traffic would bear, though generally from $10.00 to $25.00 a month from liquor dealers, $25.00 per month from proprietors of houses of prostitution and $15.00 from each inmate, and $35.00 a month from gamblers. (Tr. 192-194). Thus, in addition to license collections, there was collected from Central Hotel (subleased by Harwood—Tr. 610), a gambling and liquor place (Tr. 194, 610), Miners Club for gambling, Miles Cononch, for beer at his home, Mrs. Dalo, Hotel Bilberg for gambling, Mrs. Burns, prostitution, Muckers Club, gambling, Fern Hotel Apartments, prostitution, Lagore, gambling, Mrs. Hall, beer, Josephine Prazza, beer, Mary Morland, beer, Headlund, whiskey, Mullan Inn, liquor, Mon-nic Cabin (also leased by Harwood—Tr. 609-610) prostitution, Yellowstone Cigar Store, gambling, and from time to time others who came and went as liquor dealers, gamblers or prostitutes and whose names or places appear on the monthly lists. (Tr. 194-198; 199-232; 348-390; Exs. 2, 7). Except two subscriptions on the list of May 1, 1927 (Tr. 200), and the additional and separate subscriptions for special police in September to and including December, 1926 (Tr. 364-372, 496), every subscriber was engaged in gambling, prostitution, or liquor dealing, and no persons

engaged in lawful business were asked to subscribe. (Tr. 193-198; 233-237; 255, 260, 414).

The Trustees, while Needham was Chief, offered to pay him a percentage of collections, (Tr. 254) were furnished a monthly list of subscribers (Tr. 238, 393-395; Ex. 10) and in meeting discussed collections, giving the Chief authority to modify payments where business was poor. (Tr. 234, 236, 238, 255, 256, 393) and at least twice arbitrated disputes over payments, (Tr. 198, 235, 241-242; 243-244).

The number of persons and places paying licenses and subscriptions for gambling, prostitution and liquor dealing as appears from the testimony of Needham (Tr. 189-237) and the testimony of investigators, citizens, prostitutes and defendants of the purchase and sale of liquor and government raids (Barron, 422; Johnson, 431-446, 453-455; Webb, 460, 463-464; Collins, 470-472; Morgan, 472-474; Pilan, 474-476; Reed, 476-477; Hesser, 478-479; W. A. McGill, 479; Jewell, 480-482; Cooper, 499-501, 527-531; Sloan, 544-548; Grant, 565-568; Graham, 569; McKinney, 570; Delamo, 573-574; Keyes; 587, 588; Defendants Harwood, 608-611; Anderson, 614-615, 617-619; Speck, 620-623; Pikkerainen, 624-626, 631; West, 632; Gardner 636; Appleton, 637; 638; Arblis, 639; Kennedy, 640, 642; McDonald, 644, 645; Appellant Bloom, 748) shows clearly the wide open conditions maintained unmolested by county and city enforcement officials under the licensing

and subscription systems, and corroborates fully the testimony of Anthony McGill, who is so bitterly assailed in Appellant's brief, in his description of conditions.

McGill, a miner, for a few months in the latter part of 1928, conducted, in partnership with Fond, one of the defendants, and proprietor of the notorious Bilberg Hotel and Bar, the open saloon, the Mullan Inn, from which Federal Agents time after time arrested violators of the liquor laws, (Tr. 260, 433, 454, 458, 460, 463-464, 470-471). He describes conditions while he was in business. "I xx ran an open bar room; sold beer, whiskey and wine openly over the bar. I got my whiskey from the defendant, Fond, at the Bilberg. xxx We got beer in 12 case lots of 24 pint bottles. I never had any trouble with any officers at the Mullan Inn. I paid my license every month. xx Welch (Chief of Police) drank whiskey at my place. At one time he brought me some whiskey from the Bilberg. xx Morphy (Policeman) was in and around my place. xx Charles Bloom, deputy sheriff (Appellant) xx made an occasional visit xx. At any time he came in. I asked him to take a drink and he did. xx I was never interfered with by Bloom. I was assisted by him once. xx He came in the place and told me they (Federal officers) were raiding" (Tr. 260-262) "I have seen Bloom in the Bilberg on numerous occasions, xxx drinks were served while he was there".

(Tr. 262-263). "I seen him (Sheriff Weniger, Appellant) in there on one occasion. xx I was serving the boys drinks back and forth. xx Weniger and several of these campaigners were all in there (Bilberg Bar) drinking". (Tr. 266-268).

"To go in the bar room at the Bilberg you went through a lobby and then into the big bar room; never been changed since the open days. Back of the bar room was another bar room and little wine rooms in there that was used when they had warnings that the federal agents were coming. xx The drinks were served over the bar just as in Alaska or Butte in the early days. I bought drinks from Anderson at the Rockford xx an old time bar. Drinks served over the bar. xx Appelton had a bar at the Central Hotel xx serving drinks over it. xx The Hunters was a hotel upstairs and bar room downstairs xx drinks were served over the bar. xx The Bolo was gambling in front and a bar in the back. xx Joe Florin xx a policeman there for a while xx had the Dew Drop Inn last fall. I bought drinks there. xx Frank Hahn, first at the Miners Club xx was running a bar room, an open bar. xx Hartley (was in) the Smokehouse, a bar room with drinks served over the bar. xx Kennedy xx had a little table in the back where you could sit down and get a drink. xx Babe Kelly xx was hooking xx upstairs over where the Rockford used to be xx the Coffee Shop was a sporting shop xx Normile xx ran a saloon and sold drinks

over the bar. xx Pikkerainen xx was Frank Hahn's partner in the Rockford and Marble Club xx handling liquor. xx Joe Speck was with Hartley xx just a bar xx. Fern apartments xx was a hook shop. I got drinks there. Wilcox xx in the Bolo xx bartender. xx Aggie West was handling beer. xx You played poker at any time you wanted to. xx While I was running the Mullan Inn there was only one time the places were molested by the sheriff or police officers of Mullan. It was over Frank Hahn's refusing to pay a license. xx I was never molested." (Tr. 270-275)

"Anybody could walk in and see what was going on. When Prohibition agents came we would have warning. xx The sheriff's force and police let us know. xx Bloom on one occasion, (and) notified a few times it was dangerous and Welch communicated with me that there was danger and that the Federal men were in town, and to get the stuff out and lock up xx. I got warning several times before the federal men came. (Tr. 278)

"Q. What other places did you go besides the Bolo and the Bilberg?

A. Well, starting at my place (Mullan Inn) you go next door to the Coffee Shop xx and you can get a drink, and then on down the street to the Hunter Hotel and cross the street and go down one block to the Miners' Club. You come back the same side of the street, past the Cumberland Hotel and the

Victor Hotel, and then you come to the Smoke House and you can get all you want there, and after that the Coffee Shop and you can get all you wanted there until the time they closed up. The Central—you walk down to the Central—that was padlocked during my time, then you cross over to Headlund's and get a drink there. Then you can go to the Rockford and get a drink there, and then you come up around to the Lagore's, the Dew Drop Inn, and the next place would be the Bolo, and the next place would be the Bilberg." (Tr. 281).

"The town was wide open. Just as wide open as Alaska xx in 1910 xx. The only difference is you have to pay a little more for your drinks and you do not get good stuff like you use to. xx The only time it would be tightened up a little bit would be when the Federal officers were around. Anybody could come in and get a drink. Any stranger could walk along the street and observe a place where liquor was being sold and people drinking in there and they could smell it on the sidewalks. xx Going up and down the main street of the town a person could look into some of these places and see liquor being dispensed. You could at the Mullan Inn that I was running. xx You could stand right across the street from the Bilberg and see them lined up and drinking. xx The Chief of Police Welch was a regular patron of my place." (Tr. 297-299).

Deputy Bloom was in the place while they were operating, The Bolo, Bilberg, Mullan Inn, Mullan

Pool Hall (Tr. 236-237, 246, 261), was frequently in Mullan, drinking beer and whiskey (Tr. 245, 253). Chief Needham, and policeman Morphy frequented the places (Tr. 261). Bloom warned of Federal raids (Tr. 261-262, 272, 284-285, 292, 294), and worked with bootleggers for Weniger's election (Tr. 263-265), and was paid money by McGill while the latter ran the Mullan Inn. (Tr. 266, 285-287, 304). Sheriff Weniger was in the Mullan Inn, and the Bilberg while drinking was going on, (Tr. 266-268, 282, 283-284) and after McGill had given an affidavit to government investigators Weniger sent his deputies Bloom and Chapman to McGill's Hotel after him. When taken to the sheriff's office, Weniger charged him with telling that he (McGill) was making beer for the Elks, accused him of stooling and helping the government men out—said the heads of the companies made him have these places run wide open, and told him to stay out of the joints (Tr. 268-270, 282-283), though while running his liquor joint, McGill was never molested (Tr. 275). In August, 1928, Chief Needham and policeman Welch were instructed to keep the drunks off the street, because the governor was going to visit Mullan (Tr. 303-304, 305). Shortly after Barron had reported Mullan liquor violations to Federal officers he was arrested by Weniger and Bloom for assaulting one of the women from whom he purchased. A half hour later Johnson and Webb, federal prohibition agents,

happened to come to the jail, and Weniger told them he had their federal stool pigeon, and that he wished they would stay out of his county as he could look after it better without their help. Barron kept a note book record of his purchases of liquor, and this Weniger took and examined and advised Barron he should not stool on these people and threatened to deport him to Canada. Needham was there also. (Tr. 422-424). Barron pleaded guilty to assault, because the jail prisoners were allowed to beat him up, and Weniger promised he would be let off with a $10.00 fine, otherwise he would put him in State prison, (Tr. 425, 427, 430).

When federal raids were made in Shoshone County in August, 1929, the prohibition agents had two Kootenai County, Idaho deputy sheriffs assisting them. Neither Weniger nor his deputies assisted, and Weniger objected to the presence of deputies from other counties, (Tr. 446-447). For a short time in 1927, Prohibition Agent Johnson was stationed at Wallace and asked Weniger if he could get a little help if he needed it. Weniger told Johnson he (Weniger) had all he could handle without doing anything on Prohibition, that his deputies were under bond and that if they went out the agents might shoot someone and he would get in trouble. Weniger never gave assistance in liquor cases in Shoshone County, (Tr. 448). While raiding, at times the telephone would ring, the agent would

answer and be told to get out, that the Federals were coming, (Tr. 457, 458). In 1924 Weniger told Agent Webb that he had been elected by the wet element and didn't choose to do any work along the enforcement line, (Tr. 462, 466).

In April and June, Cooper, as undercover Agent, and Rogers, special investigator, were in Shoshone County making investigations which, in part, led ultimately to the indictment. Cooper bought liquor at various places in Mullan and Wallace (Tr. 499-502, 527-528; 531) during which Morphy, night policeman, inquired, in one of the places, if he was a Federal stool pigeon, and required him to empty his pockets. On June 15, their secret work was practically completed. That morning Weniger came to their hotel, accosted Rogers and Cooper and demanded their identity, stating he was investigating the issuance of bad checks. Their identity as Government Agents disclosed to Sheriff Weniger and Deputy Bloom, they were allowed to return to the hotel, and Rogers, in ten or fifteen minutes sent Cooper out to see if he could buy liquor as he had been able to do the night before and previously, (Tr. 502-503, 522-523; 532-534, 542). He visited several places in Wallace where he had bought liquor before, and was unable to buy. He then proceeded to Mullan and was likewise unable to buy there, (Tr. 504-514, 524).

In August, 1929 Bloom called upon one McCreary

in Mullan and complained of gambling. McCreary said: "The town has been running free and wide open for the past few years; they are running whiskey joints, they are selling whiskey over the bar in several places . . . Why don't you go out and close these places up?" Bloom said, "I am not running the County. I have got to do as I am told." The next morning Weniger and Bloom visited McCreary's father and told him his son had got sassy and "you will have to stop that or we will take him down and if we take him down it will be too bad for you and him both." (Tr. 549-554) Bloom told the McCrearys to close up, clean the place up as he had found out that the federals were going to come in. (Tr. 557)

Defendant Anderson was arrested by Federal officers but not molested by Village officers or the Sheriff (Tr. 617). Defendant Speck was arrested by Federal officers, convicted and confined in Sheriff Weniger's jail; afterward returned to the liquor business in Mullan, and again arrested by Federal officers, but was not molested by Village officers or sheriff Weniger, (Tr. 620-623, 703). Defendant Pikkerainen dealt in liquor, was arrested by Federal officers, served time in Sheriff Weniger's jail, returned to the liquor business in Mullan, and was rearrested and convicted by Federal officers, but never, except in 1925, molested by Village or County officers. (Tr. 624-631, 702). Federal officers alone ar-

rested Defendant Gardner for liquor violations at Mullan. (Tr. 636-637). So also Defendants Appleton (Tr. 637-639), Arbliss (Tr. 639), Kennedy (Tr. 641-642), Babe Kelly (Tr. 644), Mona McDonald (Tr. 645).

The enforcement of liquor laws by the Sheriff became progressively less—in 1925 he had 25 or 26 cases in the whole county; in 1926, nine; in 1927, five, in 1928 and until after a series of raids by Federal officers in August, 1929, none at all. He did not testify that a single case at any time was made in Mullan—yet he knew during all this time Federal officers were constantly discovering violations in the County, and made as many as 150 cases (Tr. 698-701). He knew Federal officers continuously raided these places in Mullan, that they continued to operate, but he made no investigations, (Tr. 703). Notwithstanding the notorious conditions, and that he claimed to be constantly looking for liquor violators, in 1928, he says he never ran across anybody. (Tr. 705). During the years he was officer he was in Mullan two or three times a month (Tr. 697). The attitude of Sheriff Weniger and Deputy Bloom toward the notorious Mullan conditions is illustrated by Bloom's testimony of indifference, Transcript pages 728-748, and Weniger's statement to the United Press correspondent during the course of the trial:

> "The reason that I am in this jam with the Federal authorities is that during my term of office as Sheriff of Shoshone County, I have steadfastly refused to cooperate with the Federal dry agents and would not allow myself and men to become stool pigeons for the Prohibition officers. For the last year Shoshone County has been overrun with undercover agents of the dry forces until it is now impossible for a stranger to enter the boundaries of the county without being placed under suspicion." (Tr. 757).

The Village trustees, as a body, were advised by the Village attorney that the practice was illegal; again in 1927 certain of the trustees were told by the attorney that if collections were being made from everyone engaged in an unlawful business, it was unlawful and should be stopped. They stated that as they were not personally profiting they thought there was nothing wrongful about it, and did not consider that the Federal Prohibition officers intended to disturb the situation, and they were merely expressing the wish of the community. (Tr. 419-420, 595, 611-612). Later, about July 1, 1929, the Attorney advised the Clerk that the Government was investigating and the practice should be stopped. The Clerk conveyed the advice to the trustees and thereupon licensing and subscription taking was ordered stopped. (Tr. 397-401).

ARGUMENT

We shall group for discussion the contention of appellants, pages 16-34 of their brief, and the assignments of errors, Nos. 149 and 150 (Tr. 134-135), argued on pages 92-108 of appellant's Brief.

When they say, "Our contention is that the United States cannot found a criminal prosecution in whole or in part on an official act of a state or any instrumentality of a state and that where that is attempted, the Federal Court in which such prosecution is brought, is without jurisdiction to proceed", we think the appellants utterly failed to understand the indictment. Weniger and Bloom, together with the other defendants, were not indicted for conspiracy to pass an ordinance of the Village of Mullan. They were indicted for a conspiracy to commit violations of the National Prohibition Act.

We concede that the trustees had the power to pass ordinance No. 105. That ordinance on its face is apparently legal, and innocent, and we do not question that it is constitutional. It is the use made of the ordinance of which the government complained—we contended that Section 11 of the ordinance (Tr. 312) was a subterfuge passed and used for the purpose of illegally licensing the sale of intoxicating liquor under the guise of "solf drink" businesses. The conspiracy in this case was originally among the bootleggers themselves who committed the substantive offenses against the National

Prohibition Act, and the officials of the Village of Mullan joined that conspiracy, just as the members of the sheriff's office did. The officials of Mullan furthered the conspiracy by certain means, among others of which was the passing of ordinance No. 105, under which the officials licensed and collected money monthly from saloons under the guise of "soft drink" businesses, collecting monthly from beer sellers, prostitutes and gamblers, without issuing a "soft drink" license, and the sheriff's office aided the conspiracy by assisting the bootleggers to violate the National Prohibition Act. No complaint was ever made in this case of the officials of Mullan in either passing or having the power to pass ordinance No. 105. It was and is the use of that ordinance as a subterfuge to illegally collect money from, and granting immunity to, and assisting in the substantive violations of the National Prohibition Act by the bootleggers, of which the government complained, and it was the active, affirmative assistance by the members of the sheriff's office given the bootleggers themselves that made Weniger and Bloom co-conspirators.

The great definitive decisions of which McCullough vs. Maryland, and Osborne vs. Bank of United States, are illustrative, have no application here. We willingly concede that the government of the United States and the governments of the several states are each supreme within the limits of their

respective powers, but where their powers come into conflict, those of the general government must prevail.

The Government did contend in this case that where a State Prohibition Statute imposes a duty of enforcement on an officer, and that officer purposely did nothing in his office to enforce such statute, and at the same time knew of the open and continuous violations of prohibition laws, which acts were also violations of the Federal Prohibition Statutes, that this mere negative attitude on the part of such officer might become an affirmative act in furtherance of the conspiracy to violate the Federal Prohibition Statute, for if such officer knew of the conspiracy to violate the National Prohibition Act and purposely failed to perform his duty to prevent violations or apprehend violators of the State Prohibition laws, who were also violators by the same acts of Federal Prohibition Laws, this mere purposeful failure to perform his duty under the State Statute was a necessary circumstance to the continuance of the conspiracy, and gave aid and assistance to its continuance and success, and such officer thus assisting in such conspiracy by such conduct, became a co-conspirator:

Burkhardt vs. U. S., 13 Fed. (2d) 841.

This proposition is consistent with the principles announced in Gambino v. U. S., 275 U. S. 310, to the

effect that state officers were under no obligation to enforce the National Prohibition Act.

It was not "the theory of the court all through the trial that the failure on the part of the state officers to enforce the state laws was sufficient to connect them with the conspiracy to violate the laws of the United States" (Appellant's Brief, p. 94). Neither was that the position of the Government. Judge Webster's charge correctly stated the law in this regard:

> "Mere knowledge, acquiescence or approval of the act without cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose." (Tr. 776)

Then continuing with respect to Weniger and Bloom:

> "These defendants are not on trial for a mere failure to enforce the prohibition laws, state or national, in the village of Mullan or in the county of Shoshone. These defendants are not accused of acts of omission but of commission, namely, that they entered into the conspiracy described in the indictment to violate the prohibition laws of the United States in the particulars set forth in the indictment.
>
> "But, gentlemen of the jury, in this connection I instruct you that where individuals are the occupants of a public office or offices and

whose duties in whole or in part require of them the enforcement of the liquor laws and the arrest of those engaged in such law violation, and it is made to appear that within the jurisdiction of such offices, such laws are openly, notoriously and continuously violated in such manner and under such circumstances that the jury is satisfied beyond all reasonable doubt that such peace officers *in fact knew* of such flagrant, open and continuous violations, if you find there were such, and that such officers did little or nothing to enforce the laws that were being violated by arresting those engaged in their violation, these are facts and circumstances which you have a right to take into consideration together with all the other facts and circumstances disclosed by the evidence in the case as shedding light on whether or not such peace officers, or any of them, *actually joined* the conspiracy charged in the indictment *and aided and permitted* its execution. In such circumstances you should inquire whether such acquiescence in such law violation, if you find there was such, was due to mere negligence, inefficiency, incompetency or inability to perform the public duties devolving upon such officer or officers, or was the conduct passive and *intentional with full knowledge of a conspiracy to bring about such violation* and was passed *with a view and for the purpose of protecting and aiding it.* In other words, was the inaction or acquiescence, if any, due to a mere failure of duty, or was it a passive refraining from performing the duty with

the knowledge of the violations *for the purpose of aiding and assisting in the conspiracy* to violate the laws which were being violated?

"Mere lack of diligence in the performance of their duties on the part of public officers is not enough. There must in addition be proof of *knowledge of facts showing an intention* on the part of the officers in question *to aid in the unlawful act by refraining purposely from doing that which they were by the duties of their office bound to do, with the intent and for the purpose of becoming a party to and aiding in the execution of a conspiracy to violate those laws.* This you must determine by your virdict in the light of all fact and circumstances disclosed by the testimony in the case." (Tr. 779) (Italics ours.)

It is not true that "this conspiracy was attempted to be shown by acts which were a crime under the laws of the State of Idaho, and it was attempted to sustain those acts as proof of the conspiracy charged on the ground that the general evil intent might be found in the purpose to commit crime," (Appellants' Brief, p. 95), for every sale of whiskey, every sale of Beer, and every nuisance maintained as shown in the evidence was a direct violation of the National Prohibition Act. It is true they also were violations of the State Prohibition Laws.

All through their argument, Appellants have failed to recognize that the 18th Amendment has

changed the relations of the State and Federal Governments in the prohibition field.

Appellants say (Brief, p. 106):

> "If the licenses issued by the government of the United States to sell liquor in states where the sales of liquor were forbidden 'simply expressed the purpose of the government not to interfere by penal proceedings with the trade nominally licensed,' then the converse must be true that the action of the authorities of the village of Mullan in licensing sales of liquor therein must also simply express the purpose of the village not to interfere by penal proceedings with the trade nominally licensed, and if the United States might do that without violating the prohibition law of the state, then clearly the state or any of its instrumentalities may do the same thing without violating the prohibition law of the United States."

The converse of the condition obtaining in the License Tax Case (5th Wall, 72 U.S. 462) might be true provided the constitutional situation were the same, but since the 18th Amendment the Federal Government could not constitutionally license as they did at the time of the License Tax Case. Today neither the Federal nor State Government could so act, for the 18th Amendment, binding on both governments, prohibits the thing that was then legally licensed. Again we say, in this case, the question of two sovereignties in each state is not in point, for by the 18th

Amendment the states have surrendered to the Federal Government a power theretofore retained.

> "6. The first Section of the Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits":
>
> National Prohibition Cases, 253 U. S. 350 at page 386.

To recapitulate, the Government did not complain of a gesture of trustees of the village of Mullan in passing ordinance No. 105, which on its face is legal. It was the subterfuge in the ordinance of which we complained. The Government did show as evidence that the subterfuge employed in ordinance No. 105 was merely a part of, or incident in, the general scheme to obtain money illegally from the practice of prostitution, the conduct of gambling and the violations of the liquor laws, by granting an immunity to such violators in exchange for the monthly payments into the village treasury, and that these acts were properly admissible as tending to establish that the defendants, who in this case were also trustees of the village of Mullan, were participating in, and were members of the conspiracy charged in the

indictment, to-wit, a conspiracy to violate the National Prohibition Act in various regards.

Appellants' argument that the evidence touching gambling and prostitution was immaterial and prejudicial, was answered by Judge Webster in his charge to the jury (Tr. 778-9):

> "I charge you, however, that the only object of the claimed conspiracy in this case over which the United States and its courts have any jurisdiction is the one set forth in the indictment, namely, *a conspiracy to commit violations of the National Prohibition Act.* A conspiracy with respect to gambling or prostitution, or any of the ordinary forms of municipal vice, if confined to such places, would not be a conspiracy to commit an offense against the United States, for the reason that the United States and its courts have no jurisdiction with respect to gambling, prostitution and municipal vice.
>
> "The only object of the claimed conspiracy which you may take into account in arriving at your verdict in this case is the object alleged in the indictment, namely, that the parties conspired to violate the National Prohibition Act in the respects enumerated and set forth in the indictment.
>
> "The testimony in this case with respect to gambling and prostitution in the village of Mullan was admitted because it was so interwoven with the charge of violating the laws of the United States, namely, the prohibition laws, that it was competent for you to take it into

consideration in connection with all the other facts and circumstances disclosed by the evidence in the case as shedding light on the question of whether there was a conspiracy to violate the prohibition laws, if in your judgment such evidence has any such effect."

The theory of the Government in this case was that gambling, prostitution and bootlegging were so inextricably involved that the evidence touching upon gambling and prostitution was necessarily introduced in putting in the evidence on bootlegging.

"The general rule is unquestioned that, when a defendant is put on trial for one offense, evidence of a distinct offense unconnected with that laid in the indictment is not admissible. Smith v. U. S. (C. C. A.) 10 F. (2d) 787; Crowley v. U. S. (C. C. A.) 8 F. (2d) 118; Terry vs. U. S. (C. C. A.) 7 F. (2d) 28; Paine v. U. S. (C. C. A.) 7 F. (2d) 263; Heitman v. U. S. (C. C. A.) 5 F. (2d) 887. While this is the general rule, the exceptions are so numerous that it has been said: 'It is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions.' Trogdon v. Com., 31 Grat. (Va.) 870; State v. Baker, 23 Ore. 443, 32 P. 161. It does not apply where the evidence of the other offense directly tends to prove the crime charged in the indictment, or when a complete account of the offense charged and the defendant's connection therewith cannot be given, without disclosing the particulars of such other acts, or when it is so con-

nected and intermingled with the crime charged as to form one entire transaction, and proof of one involves proof of the other.

"Evidence which is relevant is not rendered inadmissible because it proves or tends to prove another and distinct offense. Astwood v. U. S. (C. C. A.) 1 F. (2d) 639; McCormick v. U. S. (C. C. A.) 9 F. (2d) 237; Tucker v. U. S. (C. C. A.) 224 F. 833; Lueders v. U. S. (C. C. A.) 210 F. 419. Thus it is said, in Rex v. Bond, 2 K. B. 389, quoted with approval in Astwood v. U. S., supra: 'The general rule cannot be applied where the facts which constitute the distinct offenses are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible."

Johnston v. United States, 22 F. (2d), 1 p. 5.

See also:

Kaplan v. U. S., 7 F. (2d) 594;

Allen v. U. S., 4 F. (2d) 688.

The exhibits and testimony explanatory of them show the condition existing here as required in the Johnston case, supra (Tr. 190, 199-232, 348-390, 192-198, 346-347), for the very lists of collections

show gamblers, prostitutes, and bootleggers intermingled.

The complaint of appellant about the cross-examination of Bloom, ignores the real point that we were trying to show—*knowledge* of the open violations of the National Prohibition Act, and credibility of Bloom in connection with the conditions existing of open violations of the liquor laws in the places where Bloom was physically present. The Bilberg Hotel ran an open bar (Tr. 284, 197), and if Bloom said he saw card playing without knowing whether the players were gambling, he would likely say the same thing about the drinking at the bar without knowing what was being consumed, and would purposely make no attempt to find out.

The testimony set out, pages 41 and 42, Appellants' Brief, shows directly that Bloom, a Deputy of Weniger, was in direct contact with a bootlegger who was operating an open saloon, the Mullan Inn, and used McGill and his car to assist in the election of 1928. We knew of no better way to show knowledge, association and a working agreement between the officers and law violators, and hence its materiality. That it was not prejudicial, if error, is conceded by appellants. (Pages 43, 89, Appellants' Brief).

The question asked under assignment of Error No. 17 (Tr. 74), was manifestly improper. It does not contain the elements necessary in a question for

impeachment—the name of the person, the place, and the time were all necessary. If it was not an impeaching question, appellants would have been bound by the answer. They could not otherwise test the credibility of the witness. The Court was willing to allow a properly framed impeaching question (Tr. 297), and counsel evidently accepted the view, that the question was intended to impeach, since he did not express any view otherwise at that time. It was manifestly unfair to the witness.

Assignment of Error No. 20 (Tr. 77), discussed on page 34 of Appellants' Brief, covers Exhibits 5-A (Tr. 323), and shows the action of the Village Board in passing ordinance 105. It is not the ordinance itself.

Assignments of Error Nos. 58 to 96 (Tr. 100 to 112), concerns the testimony of Government Agents Cooper and Rogers, which was offered as a circumstance from which it could be inferred that the Sheriff's office disclosed to the bootleggers the investigation of the Agents so that they were, immediately after the conference with Weniger, unable to buy liquor in places where they had been buying before.

Counsel's statement (Brief, page 48) that "On cross-examination he (Cooper) admitted he thought they had been uncovered around the 13th of June, two days before the interview with Weniger" (Tr. 521) simply is not true. Cooper said (Tr. 521), "I was not having any difficulty before the 15th. I was

not having difficulty in buying stuff before getting into trouble with Weniger."

The fact that the Agents could not buy liquor in Wallace after the conference is no indication that the Government was trying to show conditions outside of Mullan, but this was part of the fact that they could not again buy liquor in Mullan, and tended to show that Weniger was assisting the bootleggers. The unsuccessful attempts of Cooper to buy liquor within fifteen minutes after the conference with Weniger is such a close relation in time and place, that the testimony was relevant. The weight, of course, was for the jury. It was the fact that their identity was not disclosed, despite the officials being advised by Rogers, and that they did buy liquor up to the time of the conference with Weniger, that permitted the jury to infer that Weniger disclosed their identity to the bootleggers.

Assignment of Error No. 145 (Tr. 129).

We have made a full statement of the case, and this shows Weniger's connection with the conspiracy. Pages 60 to 67, Appellants' Brief, are largely an attempt to discredit McGill's testimony, but his credibility was for the jury. The alleged impeachment consists largely of denials of certain incidents by defendants Bloom, Fond and Malloy. We submit that the bootlegger defendants who paraded to the witness chair corroborated in part the testimony of McGill:

Anderson, Tr. 614; Speck, Tr. 620; Pikkerainen, Tr. 624; West, Tr. 631; Thompson, Tr. 635; Gardner, Tr. 636; Appelton, Tr. 637; Arbliss, Tr. 639; Kennedy, Tr. 640; Kelly, Tr. 643; McDonald, Tr. 644; and the jury convicted all of them in this case. McGill cannot be dismissed with the gesture that he was so thoroughly impeached that his testimony was worthless for any purpose (Appellants' Brief, page 84), for his testimony is sufficient when the jury believes it.

> "That a conviction may rest upon the uncorroborated evidence alone of an accomplice is now well settled."
>
> Hass v. U. S., 31 F. (2d) 13, at page 14.

In resume, this record shows that Weniger was sheriff of Shoshone County from 1923 to time of trial, December, 1929 (Tr. 680), and at all times had knowledge of the liquor violations detailed in the evidence, and knew many of the bootlegger defendants (Tr. 694-701-703), and yet he made no arrests for liquor violations from October, 1927, to August, 1929, during which time the Federal agents made in Shoshone County 150 cases (Tr. 701), and this despite Weniger's refusal to cooperate or assist the federal agents (Tr. 446-448; 462-66). Furthermore, knowing of the conditions in Mullan, he was in the Mullan Inn while the liquor was being served over the bar (Tr. 266-267) and drank liquor at the bar in the Bilberg Hotel (Tr. 284). But not content with permitting bootlegging to flourish, he at-

tempted to coerce McGill into silence, accused him of "stooling for the Government" (Tr. 269-270, 282), and exposed the Government agents, Rogers and Cooper, to the bootleggers (Tr. 523), and took Barron's notes of evidence of purchases of liquor from violators in Mullan, which was for use of the Federal Agents (Tr. 423), and threatened to get Barron out of the country, and also threatened Earl H. McCreary and his father, H. W. McCreary, with arrest if they didn't stop talking of the open liquor selling in Mullan (Tr. 550 to 554).

Counsel's statement, Brief p. 79, is most significant and gives the underlying reason for the very condition existing of which the Government complained in this case. In speaking of the statement given by Weniger to the newspaperman, Ray Sheridan, (Tr. 757 and 758) they say "the interview testified to by Sheridan represents fairly the attitude of Mr. Weniger concerning Federal enforcement in Shoshone County." Given that attitude toward the prohibition laws and his desire to stay in his office, the fertile field was available for the seeds of this conspiracy to flower.

Counsel then argues, Brief, p. 83, that there is no evidence to go to the jury, but they ignore the evidence hereinbefore discussed.

This court does not concern itself with the weight of conflicting evidence,—only whether there is sufficient evidence to warrant a conviction:

Driskill vs. U. S., 24 F. (2d) 413;
Allen vs. U. S., 4 F. (2d) 688.

Assignment of Error No. 146 pertains to refusal of the court to direct a verdict for Bloom. Again they advert to McGill and attempt to talk out of the record, the bribery of Bloom, his warning that the prohibition agents were coming, his assistance of McGill in disposing of liquor, and his drinking in the Mullan Inn (Tr. 260-262), and his attempt to coerce the McCrearys into silence concerning the liquor conditions in Mullan (Tr. 549-554). Again we refer to our statement of the case for Bloom's place in this conspiracy.

Appellant's requested instruction covered by Assignment No. 153 (Tr. 138), was in substance given by the Court (Tr. 779). Likewise was assignment No. 155 (Tr. 139; Tr. pp. 776 and 779):

Kettenbach vs. U. S., 202 F. 377.

Assignment No. 154 (Tr. 140) covers two questions and attempts to say what the law of search and seizure has been since March 26, 1927. There is nothing in the record on which to predicate this instruction (Tr. 683).

The Constitution of Idaho was adopted July 3, 1890. Article 1, Section 17, reads:

> "Sec. 17. Unreasonable searches and seizures prohibited. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall

> issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized."

and has, since statehood, been the law of Idaho. Additionally, the instruction unduly emphasizes a part of the testimony, to-wit, that of Weniger (Tr. 685, 712).

> "When a requested instruction contains several propositions of law, one of which is unsound, refusal to grant the request is not error."
>
> Timell vs. U. S., 5 F. (2d) 901.
>
> Gin Block Sing vs. U. S., 8 F. (2d) 976.
>
> Baugh vs. U. S., 27 F. (2d) 257.

Requested instructions covered by Assignments Nos. 157, 158, and 165 were in substance given by the court (Tr. 774, 787).

> N. G. Sing vs. U. S., 8 F. (2d) 919;
>
> Meadows vs. U. S., 11 F. (2d) 718.

While the books are full of municipal vice cases, and cases involving officials for grafting moneys through their official positions, we submit that the books do not contain a case analagous to the instant one, in that all of the officials concerned seem to have a moral blind spot precluding them from seeing the effect of and duties imposed by the prohibition laws, both state and federal. This case seems to us to be in its larger aspects, a question involving good citizenship, and that if the acts complained of in this case are permitted to stand, the precedent estab-

lished would become a criterion by which state and municipal enforcement officials could circumvent and defeat in large measure, the Federal Prohibition Laws.

We confidently assert that the record does not disclose any prejudicial error concerning any defendant, either those appealing, or those accepting the judgment of the court, and that the eminent jurist who tried this case gave the defendants a fair trial on the charges preferred in the indictment. Because of this, the judgment should be affirmed.

Respectfully submitted,

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